

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP2249

Cir. Ct. No. 2010CV337

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CREDIT ACCEPTANCE CORPORATION,

PLAINTIFF-APPELLANT,

V.

STEVEN SHEPHERD AND KRISTIE SHEPHERD,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Iowa County:
EDWARD E. LEINEWEBER, Judge. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Credit Acceptance Corporation (CAC) appeals a judgment awarding Steven and Kristie Shepherd attorney fees pursuant to WIS.

STAT. § 425.308 (2011-12),¹ the fee shifting provision of the Wisconsin Consumer Act. CAC argues that the Shepherds were not prevailing parties under the Act because (1) the circuit court made no finding of a violation of the Act and (2) CAC's failure to attach a copy of the contract to the complaint as required by WIS. STAT. § 425.109(1)(h) does not constitute a violation of the Act. We disagree and affirm the judgment.

¶2 CAC commenced this action seeking a deficiency judgment against the Shepherds pursuant to a retail installment contract. After a default judgment was entered on the complaint, the Shepherds filed a motion for relief from the judgment, alleging that the complaint failed to include or attach a copy of the parties' loan agreement and falsely ascribed a 25% interest rate to the contract when the rate was actually 19.9%. CAC admitted that it failed to attach a copy of the contract to the complaint, but argued that the defect did not render the judgment void. The court granted the Shepherds' motion to reopen the case. CAC voluntarily dismissed its complaint while acknowledging that the Shepherds had a motion for attorney fees still pending. The court ultimately awarded the Shepherds attorney fees and costs totaling \$5,618.75.

¶3 Whether the circuit court properly determined that the Shepherds were "prevailing parties" under WIS. STAT. § 425.308 is a question of law that this court reviews independently. *Credit Acceptance Corp. v. Woodard*, 2012 WI App 43, ¶6, 340 Wis. 2d 548, 812 N.W.2d 525. An award of attorney fees to a consumer is appropriate where a creditor has not fully complied with the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Wisconsin Consumer Act. *Suburban State Bank v. Squires*, 145 Wis. 2d 445, 450, 427 N.W.2d 393 (Ct. App. 1988). A consumer is entitled to attorney fees when he or she prevails on any significant issue. *Footville State Bank v. Harvell*, 146 Wis. 2d 524, 540, 432 N.W.2d 122 (Ct. App. 1988). Achieving the goal of reopening a judgment and obtaining dismissal renders a consumer a “prevailing party.” See *Community Credit Plan, Inc. v. Johnson*, 221 Wis. 2d 766, 773-74, 586 N.W.2d 77 (Ct. App. 1998), *aff’d*, 228 Wis. 2d 30, 596 N.W.2d 799 (1999).

¶4 In *Community Credit*, the judgment was reopened based on a violation of the Consumer Act’s venue provision. *Id.* at 770. As in this case, the plaintiff then voluntarily dismissed the action. *Id.* This court concluded that the defendants were “prevailing parties” under the Consumer Act and were entitled to their attorney fees. *Id.* at 773. The court stated that “a party seeking attorney fees must show: (1) a causal link between his or her lawsuit and the relief obtained; and (2) that the opponent’s conduct was required by law.” *Id.* at 776. Here, because the Shepherds prevailed in their effort to reopen the judgment and succeeded in getting the action dismissed, albeit voluntarily as in *Community Credit*, and because attaching the contract to the complaint was required by law, the Shepherds are entitled to their attorney fees.

¶5 Citing *Woodard*, 340 Wis. 2d 548, ¶15, CAC argues that the Shepherds are not entitled to attorney fees because they were required to show both a significant benefit in the litigation and a violation of the Consumer Act. *Woodard* is distinguishable for two reasons. First, the judgment in *Woodard* was reopened pursuant to a stipulation by the parties in which they agreed that neither would admit liability of any sort. *Id.*, ¶14. The parties made no such agreement here. Second, the alleged violation of the Consumer Act was the plaintiff’s failure to give notice of the right to cure. *Id.*, ¶3. This court denied *Woodard* attorney

fees because the circuit court made no finding regarding notice of the right to cure. *Id.*, ¶5. In contrast, here there is no question of fact regarding CAC’s failure to attach a copy of the contract to the complaint. Attorney fees and costs are awarded in cases in which the creditor has not “fully complied with Chapters 421-27.” *Id.*, ¶15. The requirement to attach a copy of the contract to the complaint in WIS. STAT. § 425.109(3) fits that requirement.

¶6 CAC argues that a pleading defect does not constitute a violation of the Act. Rather, WIS. STAT. § 425.109 prohibits the court from entering a judgment on a complaint that does not have a copy of the contract attached. To say that the statute does not create a duty for the plaintiff is an exercise in semantics. A plaintiff seeking a judgment that cannot be granted unless the contract is attached to the complaint has an obvious obligation to attach the contract to the complaint. CAC violated the Act by filing the defective complaint.

¶7 Citing *Rsidue, L.L.C. v. Michaud*, 2006 WI App 164, ¶19, 295 Wis.2d 585, 721 N.W.2d 718, CAC argues that the statute merely imposes pleading requirements on creditors and the statute does not give rise to an affirmative claim or defense for the consumer under the Act. *Rsidue* draws a distinction between matters of procedure and substantive legal principals, and notes that procedural deficiencies can typically be cured by filing an amended complaint or refile the action. *Id.* Here the circuit court rejected that analysis, finding persuasive this court’s unpublished opinion in *Auto Cash Title Loans of Wisconsin, Inc. v. Webster*, No. 2009AP676, unpublished slip op. (WI App Feb. 9, 2010). We agree.

¶8 As noted in *Webster*, *Rsidue* did not involve any issue of costs or attorney fees under WIS. STAT. § 425.308(1). Rather, this court’s primary holding

was that the Consumer Act's pleading requirements did not apply to Rsidue because it did not come within the Act's definition of a creditor. *Rsidue*, 295 Wis. 2d 585, ¶14. The discussion about claims and defenses was in response to the consumer's argument that he was entitled to the Act's protections because Rsidue was an assignee of the creditor. *Id.*, ¶18. The fee shifting provision of the Act, § 425.308, refers to neither claims nor defenses. Therefore, the portion of *Rsidue* on which CAC relies upon is quite limited.

¶9 CAC's argument that the defect in the complaint was merely temporary or technical because it could be cured by filing an amended complaint fails for several reasons. First, failure to attach the contract to the complaint is more than a technical, procedural violation. It is necessary to determine the amount of a deficiency. Second, a creditor might simply decide not to, or no longer be able to, proceed with a new case. In this case, for example, CAC offers no explanation for its failure to file an amended complaint with the contract attached, suggesting that perhaps it has no copy of the contract. If the creditor is unable to locate the contract, the consumer has a complete defense under WIS. STAT. § 425.109(1)(h). Third, as suggested by *Community Credit*, the focus is not on how the Act was violated, but whether the consumer obtained a significant benefit because of the violation. 221 Wis. 2d at 774. Finally, the Act protects customers against "unfair, deceptive, false, misleading and unconscionable practices by merchants." WIS. STAT. § 421.102(2)(b). The remedies set forth in the Act aim to guarantee compliance with its provisions. See *First Wis. Nat'l Bank v. Nicolaou*, 113 Wis. 2d 524, 533, 335 N.W.2d 390 (1983). The practice of filing defective complaints and voluntarily dismissing only if the defendant calls attention to the defect constitutes an unfair, misleading, or unconscionable practice and a defendant defending against such practices should be made whole.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

